No. 80427-3

SANDERS, J. (concurring)—The majority holds that Violet Alvarez's statements to the police were testimonial and the admission of those statements at trial was not harmless error because there was not overwhelming, untainted evidence that Duane Koslowski was armed. Majority at 25-26. I concur in the result, but disagree with the use of the "overwhelming evidence" test. That is not the proper test to determine if an error is harmless.

We may excuse as "harmless error" only an "error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). In other words, an error is harmless only if does not affect the evidence properly presented to the jury. Whether or not in our opinion there is overwhelming evidence should not be a consideration.

"[I]t is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors." *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). The assumption a court "can determine what evidence or instruction influenced the jury's decision" is "a tacit admission that an appellate court is necessarily engaging in fact-finding." Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277, 279 (1995-96).

Accordingly, I concur.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR: